NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORGE HAMMER, Individually and as Trustee, etc. et al., Plaintiffs and Appellants, v. STRATEGIC CAPITAL HOLDINGS, LLC, Defendant and Appellant.	G055369, G055430 (Super. Ct. No. 30-2015-00814280) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall Sherman, Judge. Affirmed.

David H. Pierce & Associates, David H. Pierce; Murrin Law Firm and John O. Murrin for Plaintiffs and Appellants.

Buchalter, Michael W. Caspino, and Robert M. Dato for Defendant and Appellant.

* * *

Plaintiffs appeal from a judgment entered after a bench trial in favor of defendant Strategic Capital Holdings, LLC, formerly known as U.S. Commercial, LLC.[1] Defendant cross-appeals from the denial of its postjudgment motion for an award of attorney fees. We affirm both the judgment and the order denying the motion for attorney fees.

Plaintiffs are investors who bought tenant-in-common (TIC) interests in an 18-story office building in Houston, Texas in 2006. Baylor School of Medicine (Baylor) was the main tenant, occupying over 80 percent of the building. Prior to the offering, Baylor notified the defendant promoter of its intent *not* to renew its lease. Were Baylor to follow through, the investment would suffer. The defendant promoter, however, believed Baylor's notice was a negotiating tactic, as Baylor had recently invested $21 million in tenant improvements. Defendant believed Baylor would ultimately renew the lease, and it proceeded to market the TIC investment. In connection with the investment, defendant gave plaintiffs a private-placement memorandum (PPM) that disclosed Baylor's stated intent not to renew the lease, as well as the fact that Baylor's failure to renew would be highly detrimental to the investment. At the same time, in its marketing efforts, defendant told potential investors that it believed Baylor would ultimately renew the lease. In the end, Baylor did not renew the lease, and shortly afterward the investment failed.

Plaintiffs' theory at trial was negligence. Both at trial, and again here on appeal, they eschewed a theory of negligent misrepresentation. They maintained defendant was negligent for even offering the investment in the first place, given what they knew about Baylor's intent. And they argued the disclosures about Baylor's intent

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[1] At the time of the transactions giving rise to this lawsuit, defendant was known as U.S. Commercial, LLC (U.S. Commercial), and most of the trial court documents in this lawsuit refer to defendant by its prior name. To avoid confusion, we do the same.

not to renew the lease, and the consequences thereof, were negligently inadequate. After a bench trial, the court found defendants had fully disclosed the risks, and that any reassurances about Baylor's ultimate disposition were simply good-faith predictions about the future, not negligence. The court further concluded that defendant had no duty to abstain from marketing the investment. On appeal, plaintiffs contend the undisputed evidence compelled a verdict in their favor and that legal error tainted the judgment. We conclude otherwise and affirm the judgment.

On defendant's cross-appeal, we conclude the court correctly determined the fee provision in the PPM did not cover the present lawsuit. Accordingly, we affirm the denial of defendant's attorney fee motion.

FACTS

The project at the heart of this case is an 18-story office building in Houston, Texas (the property). Each of the individual plaintiffs purchased an undivided TIC interest in the property in mid-2006. U.S. Commercial served as the sponsor/promoter of the offering of TIC interests in the property.

Prior to offering the investment, U.S. Commercial commissioned a due diligence report regarding the feasibility of the property as a TIC investment. According to the report, the key to the success of the investment turned upon whether Baylor (who occupied approximately 85 percent of the building) would renew its lease. The remaining tenants were largely dependent on Baylor, and if Baylor were to vacate, it was likely the other tenants would vacate as well. By that time, Baylor had notified U.S. Commercial in writing that it did not intend to renew its lease, which expired in 2012. The report was not provided to the plaintiffs.

What was provided to the plaintiffs, prior to their purchase of the TIC interests, was a PPM containing information and disclosures to potential TIC investors.

The PPM is approximately 80 pages with an additional approximately 420 pages of exhibits and an addendum. The PPM contains a 10-page section entitled "Risk Factors," within which is a section entitled "Expiration or Termination of Leases." It states, "Baylor has recently indicated in correspondence to the Seller that it does not intend to renew its lease after the remaining 7-year term. In addition, Baylor is entitled to renew its lease with respect to less than its entire premises, and the rental rates for such renewal are based upon 95% of certain market rents. If Baylor or any other Tenant does not renew its lease upon expiration of the current term or renews it for less than its entire premises, the Co-Owners will have to find a replacement tenant for the entire premises, or for the portion not leased by Baylor or another Tenant, as applicable, and it is possible that the rents paid under a replacement lease will be less than the existing rents, that the Co-Owners will not be able to find a suitable replacement tenant, or that the renewal rent payable by Baylor will be less than the existing rent." "Furthermore, the Baylor premises and the premises leased by the other Tenants have been designed for the Tenant that currently occupies such premises. Accordingly, if a Tenant terminates its Lease or elects not to renew its Lease, the premises might not be marketable to another tenant without substantial capital improvements or alterations." "All of the risks described in this paragraph are particularly pronounced in the event that Baylor elects not to renew its lease, renews its lease for less than the entire premises, files for bankruptcy or defaults under its lease, because Baylor currently occupies approximately 80% of the Building, and pays most of the rental that the Co-Owners will receive from the Property. Although the Partnership has formulated a business plan that the Partnership intends to implement in the event that Baylor elects not to renew its lease, there are still risks associated with such failure to renew, and with such business plan."

This was the most robust disclosure of the risk of Baylor's stated intent not to renew its lease, but not the only one. In another section regarding the "Business Plan with respect to the Property," the memorandum states, "If Baylor renews its lease when its lease expires on August 31, 2012, the Partnership will determine at that time whether it should sell the Property or continue to operate the Property. If Baylor elects not to renew its lease (and Baylor recently indicated that it does not intend to do so), then the Partnership will consider redeveloping the property, possibly by demolishing the Building and building a new state-of-the-art 150,000+ square foot office building on the Property. Such redevelopment may require additional cash from current and future investors, as well as new financing, and will also require the Ground Lessor's consent." A largely similar statement was made in another section of the memorandum. Elsewhere, the memorandum states, "Baylor leases 126,793 rentable square feet of the Building (Approximately 81.8%) through August 31, 2012. Although Baylor has four 5-year options to renew, Baylor currently does not anticipate renewing its lease."

Most of the evidence in this case came in through either stipulated facts or documents. For example, the parties stipulated that U.S. Commercial made the following representations to plaintiffs prior to the investment: "a. That the TIC investment would preserve principal; [¶] b. That the TIC investment would provide an annualized return on equity; [¶] c. That the TIC investment would be managed by an experienced and competent property manager with a local presence, and the investment would be operated on a turnkey or high-level basis, such that no further involvement would be required by Plaintiffs; [¶] d. That, in the event the major tenant of the investment property, Baylor . . . , failed to renew its lease, one or more contingency plans existed to mitigate possible losses in investment value and to preserve and continue the projected investment return to the Plaintiffs; [¶] e. That, [*sic*] U.S. Commercial was qualified to perform on all such representations described herein. [¶] f. It was implied in the PPM that the investment was suitable for retirement purposes and the mark-up or load by the Sponsor was reasonable. [¶] g. That this was a highly desirable, institutional, grade B office property."

The one witness to testify live on liability issues was Arthur Mindle, one of the investor plaintiffs in this action. Mindle was a successful business person who had just retired. Mindle was interested in investing money he had recently made in the sale of a building, so he went to a local broker named Fitzgerald who had a good reputation in the community, and who Mindle saw at the local gym several times per week. Fitzgerald presented six or seven different TIC investment opportunities. Mindle narrowed it down to four, and then Fitzgerald provided his opinion of the best three of those. Fitzgerald's opinion was that the Baylor building was the best investment because it had a national tenant who had been there long term and who had recently invested $20 million into the building.[2] According to Fitzgerald, Baylor was there to stay. Mindle reviewed a brochure for the investment that apparently mentioned that if Baylor were to vacate, the investors would have to "re-tenant" or rebuild the building (the brochure is not in evidence). If Mindle had known that Baylor had given a notice of non-renewal, he never would have made the investment. He bought it on Fitzgerald's recommendation, though he did consult an attorney prior to making the investment. Mindle never read the PPM. There was no evidence Fitzgerald was associated with U.S. Commercial.

However, it was stipulated that "U.S. COMMERCIAL made representations to the Plaintiffs that Baylor would likely renew its lease." The parties further stipulated, "Within the context of allegations made in this lawsuit, any representation made to the Plaintiffs regarding the sale and management of the Property were made by U.S. COMMERCIAL, acting as the Sponsor of this TIC investment." These stipulations would suggest that U.S. Commercial was responsible for the representations of brokers like Fitzgerald.

On the other hand, somewhat confusingly, the parties also stipulated, "Defendant U.S. COMMERCIAL, LLC served as the 'Sponsor' of the offering of TIC

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[2] The parties stipulated that, according to a 2009 report, Baylor invested $21,000,000 of its own money in tenant improvements in 2005.

interests in the Property. In such capacity, all persons and entities involved in the sale and management of the Property were acting as agents, employees, partners and/or subordinates of U.S. COMMERCIAL, LLC. (*with the exception of SEC registered broker-dealers*)." (Italics added.) And the PPM indicates all offers were made through broker dealers: "Offers and sales of Interests will be made on a 'best efforts' basis by broker-dealers . . . who are members of the National Association of Securities Dealers, Inc." This evidence suggests U.S. Commercial was not responsible for the representations of independent, licensed broker-dealers.

Another plaintiff/investor, Charles Hill, submitted a declaration, which the parties stipulated to be admissible at trial. Hill declared that U.S. Commercial made various representations to him in selling the TIC investment, including that it would provide a secure rate of return and was suitable as a retirement investment. Additionally, U.S. Commercial represented, "in the unlikely event the major tenant of the TIC property, Baylor . . . , did not renew its lease, multiple alternative plans were in place to mitigate the loss of that tenant and to ensure continued investment value and continued projected investment return." Hill further declared, "One of the statements upon which I placed the greatest reliance was the often-repeated statement that, notwithstanding anything in the documents presented to me, including the [PPM], Baylor . . . would not depart the property and would renew its lease at the TIC property. I was specifically told that any documents I received with warnings of [Baylor's] departure were only required formalities, equivalent to a common medication's recitation of all possible side-effects, and that I should accept the assurances that Baylor's departure from the TIC property was not a realistic expectation." "I was also informed that any statements to the contrary were only attempts by Baylor to establish a bargaining position for more favorable lease terms. As a part of these same representations, I was told that the arrangement Baylor had at the property was so advantageous to Baylor, including the personalization and upgrades of the building to Baylor's specific needs, that Baylor would absolutely renew their lease option." "I was informed that given their location so close to the hospital and the millions of dollars recently spent on renovations for their sole benefit making it a Class A commercial building, Baylor . . . would never walk away from such a deal."

In an apparent effort to cut down on the length of the trial, the parties stipulated that each investor's experience was similar: "The Plaintiffs in this action all had similar experiences with U.S. COMMERCIAL with respect to materials received, representations made and loss of their respective investments in Defendant's TIC offering, and are specifically agreed to have similar standing with regard to all such facts, such that the Court may consider the testimony of any one Plaintiff as representative of the actual experience and anticipated testimony of any and all remaining Plaintiffs."

Ultimately, Baylor renewed its lease for only one year, resulting in a near total loss of the plaintiffs' investments. In January 2014, after Baylor had vacated, the plaintiff investors were given the following three options: "a) Cash out for approximately 3% to 5% of their investment; [¶] b) Contribute their ownership interest, at a diluted level, into Pearl Hospitality, a newly formed entity that would develop a business hotel on the property; or, [¶] c) Foreclosure."

Plaintiffs sued U.S. Commercial for fraud, negligence, "negligent management," and breach of fiduciary duty. But by the time of trial, plaintiffs were asserting only a single cause of action for negligence. Notwithstanding plaintiffs' insistence that this was only a negligence case, there was some confusion at trial because the negligence claim seemed to hinge on various misrepresentations, and thus more resembled a claim for negligent misrepresentation. During argument, for example, when the court asked plaintiffs' counsel what the duty would be, counsel responded, "You have to disclose facts truthfully."

Ultimately, the court ruled in defendant's favor on both negligent misrepresentation and negligence. The court issued a ruling from the bench in which it first observed that it was unclear whether plaintiffs' cause of action was one for negligence or negligent misrepresentation, but that the court would resolve both: "[W]e are only looking at . . . one cause of action for negligence. However, it is a little ambiguous whether we are talking about the second cause of action as labeled, which is negligence in the marketing and offering—in marketing and offering this . . . T-I-C, or whether it's negligent misrepresentation, which has been the subject of much argument, so the court is going to basically go through both doctrines."

The court began with negligent misrepresentation and analyzed each of the statements identified in the stipulated facts recited above, concluding that none of them constituted negligent misrepresentation. Most were "a prediction of the future as opposed to a past or existing material fact," or simply not false.

Alternatively, the trial court found that many of the other statements were reasonably believed to be true when made. For example, "everybody believed that Baylor would renew its lease, even though they gave notice that they wouldn't, because it could be a negotiating ploy."

The court found that U.S. Commercial was not negligent because it warned investors four times about the situation with Baylor: "As far as the PPM itself, it contained four warnings specific to Baylor's lease situation, not just the generalized warnings of investment risk . . . . [¶] This one pointed out on four pages, you've got that Baylor does not intend to renew its lease, that Baylor has indicated it does not intend to renew its lease, and twice that Baylor does not anticipate renewing its lease. [¶] So it's in there not one, not two, not three, but four times. I'm not sure how many times it needs to be in there."

The court also observed that "Arthur Mindle, one of the plaintiffs who testified, said he would not have invested if he had known Baylor had given the notice of non-renewal, but the defendant disclosed four times that Baylor had given notice of non-renewal, so for him not to have noticed that is his failure to read the document."

Regarding the declaration of plaintiff Charles Hill, the court stated, “I read that declaration of Mr. Hill, and it’s just full of speculative comments on the defendants’ part, not facts.” Again, the court concluded the disclosures in the PPM were sufficient: “I mean here Baylor did give notice and the defendants disclosed it, so what more could they have done?”

Moving on to the negligence theory, the court stated, “The other way one can look at negligence is the plaintiffs have been citing CACI . . . 400, which is the general negligence instruction, and 401 of CACI says negligence is the failure to use reasonable care to prevent harm to one’s self or to others. [¶] So the court sees the PPM disclosures as using reasonable care to prevent harm to one’s self or to others.” “Everything I said with respect to negligent misrepresentation pretty much applies to negligence in terms of the disclosures constituting due care and people being on notice about this problem and deciding anyway to make the investment.”

The court also addressed the testimony of plaintiffs’ expert, Jeffrey Rose, who opined that the risk versus reward profile of the investment was so skewed that it was negligent to offer the investment at all: “This Jeffrey Rose opinion has been brought to my attention that the investment shouldn’t have been offered at all, but that’s just such an overstatement. [¶] If adults want to enter into a contract that’s legal they are allowed to do it. So if people have decided to take the risk of this whole investment to get this designated rate of return, then that’s their decision, and it’s not really up to anyone to stop them. You go in with your eyes open.”

Plaintiffs appealed from the judgment.

DISCUSSION

Plaintiffs principal argument on appeal is that the evidence in this case was “necessarily conclusive” in favor of plaintiffs’ negligence claims. They rest this contention on three main pillars: the expert report of Jeffrey Rose, the alleged inadequate time plaintiffs had to review the PPM, and defendant's statements that its agents believed Baylor would renew the lease. We conclude the judgment was supported by substantial evidence.

Plaintiffs also claim the court articulated an incorrect view of negligence law and then failed to make findings on comparative negligence. However, plaintiffs failed to ask for a statement of decision, and thus we imply all findings necessary to support the judgment.

Substantial Evidence

We begin with the standard of review, which plays a particularly important role in this case. We review the sufficiency of the evidence under the familiar substantial evidence standard of review. This, of course, requires us to resolve any conflicts in the evidence, and all reasonable inferences from the evidence, in favor of the judgment. Where a *plaintiff* raises such a challenge, the plaintiff must show that the evidence, viewed in the light most favorable toward the judgment, *compels* a finding of liability *as a matter of law*. (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1205-1206.) In other words, it is not enough to simply point out that there was evidence to support each element of plaintiffs' claim. The evidence must be overwhelming.

Although plaintiffs acknowledge the substantial evidence standard applies, they attempt to nonetheless shoehorn this case into a de novo standard of review, stating: "Where, however, as here, the facts by their very nature and content are undisputed, including stipulations as to the conduct of parties and the introduction of witness testimony, an appellate court performs its review independently." There are at least two problems with this approach: first, not all of the facts here were stipulated; second, even for the stipulated facts, the inferences to be drawn from the facts were very much in dispute. Accordingly, we apply the substantial evidence standard of review to the court's factual findings.

Plaintiffs' cause of action was negligence. "'The elements of a cause of action for negligence are well established. They are "(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury."'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) The only duty plaintiffs have identified on appeal is the general duty of Civil Code section 1714: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (*Id*. subd. (a).) Generally, courts look to six factors to determine whether a duty exists: "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804.)[3] "Whether a duty of care exists is a question of law to be determined on a case-by-case basis." (*Elizarraras v. L.A. Private Security Services, Inc.* (2003) 108 Cal.App.4th 237, 242.)

We begin by sketching, in broad strokes, the facts of this case as filtered through the proper standard of review. U.S. Commercial created an investment product, the value of which depended heavily on a particular condition—Baylor renewing its lease. Notwithstanding that Baylor had indicated it would not renew its lease, U.S.

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[3] Plaintiffs have adamantly insisted this is not a case of negligent misrepresentation, or deceit. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407 ["Negligent misrepresentation is a . . . species of the tort of deceit"].) On appeal, they have only briefed the matter as a negligence claim, not a negligent misrepresentation claim. Accordingly, we will not address negligent misrepresentation in this opinion.

Commercial believed Baylor would ultimately do so. And they had good reason for this belief: Baylor had recently invested $21 million into tenant upgrades. U.S. Commercial decided to offer the investment to the public, clearly disclosing Baylor's stated intent not to renew, and warning potential investors the investment would lose value if Baylor were to follow through on its intent. Notwithstanding those disclosures, U.S. Commercial persuaded plaintiffs that Baylor was likely to renew the lease in the end, and they invested. Ultimately, Baylor did not renew its lease, and the investors lost most of the value of their investment.

The first evidence plaintiffs point to as compelling a finding of negligence is the report of their expert, Jeffrey Rose. Rose essentially came to two conclusions: the disclosures in the PPM were inadequate, and the risk-to-reward ratio of this investment was so skewed that it never should have been offered to the public. On the lack of disclosures, Rose stated, "While Baylor could have presented its intention to leave as a bargaining position, a prudent investor would need information as to probability and cost of the scenarios contemplated. The risk section, particularly the topic entitled 'Expiration or Termination of Leases' on page 46 of the PPM was very specific on what could happen if Baylor didn't renew its lease but didn't discuss how the retenanting could be financed, how the owners would be affected by the terms of the loan, or the carrying costs of an empty building. This seems like serious and material omissions that cannot be reasonably explained." Regarding the risk versus reward ratio, Rose simply stated, "My opinion is that the risks of losing this investment were so high compared to the potential return that it shouldn't have been offered to a retail investor, particularly those who are elderly or retired."

As plaintiffs acknowledge, the court had discretion to entirely reject the Rose report for any nonarbitrary reason. (*Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 40.) We also bear in mind that "'an expert opinion is worth no more than the reasons and facts on which it is based.'" (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308.)

With regard to the lack of disclosures, Rose did not identify any legal duty that U.S. Commercial had concerning disclosures. Presumably, U.S. Commercial had a duty to disclose known risks, such as Baylor's stated intent not to renew the lease. But U.S. Commercial satisfied that duty. Rose's opinion assumes U.S. Commercial had a duty to go further and create financial projections for scenarios in which Baylor did not renew, stating, "a prudent investor would need information as to probability and cost of the scenarios contemplated." But plaintiffs have cited no legal basis for the premise that U.S. Commercial had a duty to provide every piece of information a prudent investor might want. Our research has disclosed no such common-law duty, and in this heavily regulated sector of the economy, we are loathe to invent duties unmoored to any existing precedent. The law of unintended consequences counsels against it. At some point, once the known risks have been disclosed, a *prudent* investor needs to make his or her own inquiries.

With regard to the risk versus reward ratio, our starting point is that investments are inherently risky. Clearly, there is no duty to offer risk-free investments. Arguably, at some point an investment becomes so risky that it simply cannot be offered to the public. But, once again, Rose's report provides no basis for determining the contours of that duty, nor whether the investment here breached that duty. And plaintiffs have offered no suggestions in their briefs. Accordingly, plaintiffs failed to satisfy the first element of a negligence claim with the Rose report.

The second evidence plaintiffs point to is the evidence that U.S. Commercial downplayed the risk of Baylor leaving in its marketing efforts. In particular, someone told Arthur Mindle that it was "inconceivable to me" that Baylor would fail to renew the lease. And Charles Hill declared he was told Baylor's departure was "not a realistic expectation," and that warnings to the contrary in the PPM were "equivalent to a common medication's recitation of all possible side-effects."

In assessing this evidence, we repeat that this is not a negligent misrepresentation case, and thus we are not focused on whether the plaintiffs relied on these representations to their detriment. Rather, our focus is on whether U.S. Commercial had a duty to avoid such comments. We also bear in mind that the court found U.S. Commercial's representatives believed in good faith that Baylor would renew.

Notwithstanding their insistence that this is a negligence claim, plaintiffs have made little effort to articulate what the duty is in this context. Under the circumstances, we conclude U.S. Commercial did not have a duty to abstain from expressing an opinion about Baylor's ultimate decision. From U.S. Commercial's standpoint, in 2006, its representatives were stating honestly held beliefs. We can think of no duty that would prohibit U.S. Commercial's agents from expressing their honestly-held opinions about what Baylor would ultimately decide to do. While this case is not a negligent misrepresentation case, we find some guidance in that line of cases holding that "predictions as to future events are deemed expressions of opinion, and thus not actionable." (*Richard P. v. Vista Del Mar Child Care Service* (1980) 106 Cal.App.3d 860, 866) There is an exception to that rule when "the speaker has knowledge of facts not warranting the opinion . . . ." (*Ibid.*) But that is not the case here. Baylor's recent investment of $21 million in tenant-specific improvements warranted U.S. Commercial's belief that Baylor intended to stay for the long term. Accordingly, U.S. Commercial's marketing efforts did not compel a finding of negligence.

The next evidence plaintiffs points to is the stipulation that "Plaintiffs were not aware of the full consequences of Baylor failing to renew its lease at the Property." Plaintiffs play a bit fast and loose with this stipulation, characterizing it as a stipulation that plaintiffs were not "made aware" of the consequences. But that is not what the stipulation states. U.S. Commercial did not stipulate that it failed to apprise plaintiffs of the risk. Accordingly, this stipulation did not compel the court to find negligence.

The remaining evidence plaintiffs point to was simply disputed and, therefore, did not compel a finding of negligence. For example, plaintiffs claim the PPM was given to them at the same time they signed their commitment to invest, leaving them no time to review it. But it was stipulated they received it before they invested. And a reasonable inference from Hall's declaration, which described warnings about Baylor leaving as tantamount to warnings on drug packaging, is that Hall received the PPM prior to investing. Plaintiffs also claim that various statements U.S. Commercial made about its own abilities, and its expectation for the performance of the investment, were made "either in the face of contrary information known to Defendant at that time or without regard to their truth." But there was no evidence compelling that finding. There was no compelling evidence that U.S. Commercial lacked competence, and its financial projections were simply predictions, common in the finance industry.

Finally, throughout their brief, plaintiffs repeat the allegation that a reasonable promoter would not offer an investment that was "doomed" from the outset. But there was no evidence compelling the conclusion that the investment was doomed. As plaintiffs' own expert conceded, "Baylor could have presented its intention to leave as a bargaining position . . . ." With the benefit of hindsight, it is easy to view Baylor's departure as a foregone conclusion. But from U.S. Commercial's perspective in 2006, the investment did not seem doomed at all. Accordingly, we conclude the court's judgment was supported by substantial evidence.

Implied Findings

Next, plaintiffs raise two arguments, which we will address together because they are both refuted by the same doctrine: implied findings. First, plaintiffs contend the court misunderstood the law when it declared in connection with plaintiffs' decision to invest, "if that's what people want to do it is a free country," and, "[i]f adults want to enter into a contract that's legal they are allowed to do it." Plaintiffs argue the court improperly applied *laissez-faire* principles that have long been superseded by federal securities regulations. The other argument plaintiffs make is that the court failed to make findings on comparative negligence.

Normally, we imply all findings necessary to support the judgment. To avoid the doctrine of implied findings, the losing party must perform two steps: request a statement of decision, then object to the statement of decision on the specific ground that the court failed to make a required finding. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) Here, plaintiffs did not request a statement of decision. Accordingly, we imply all necessary findings to support the judgment.

With regard to the court's comments about freedom of contract, we regard those statements as simply editorial commentary on the facts of this case. Not only do we imply findings on all necessary elements of the negligence claim, but our review of the transcript persuades us the court did, in fact, address all necessary elements of the negligence claim. For example, the court stated, "[T]he court sees the PPM disclosures as using reasonable care to prevent harm to one's self or to others."[4]

We come to a similar conclusion regarding comparative negligence. To the extent the court was required to make a finding, we imply a finding that U.S. Commercial was not negligent at all and thus was zero percent at fault.

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[4] We also note plaintiffs did not try this case as a violation of federal securities regulations—it was neither a pleaded cause of action, nor did plaintiffs attempt to establish U.S. Commercial's duty of care by reference to federal securities regulations. So far as we can determine, plaintiffs did not raise any federal securities regulation at any time during trial. Nonetheless, plaintiffs include a somewhat lengthy discussion of "suitability" and other federal regulations in their brief. Their discussion is not exactly clear in this regard, but to the extent they are contending we should reverse because those federal regulations were violated, we deem the argument to be forfeited due to their failure to raise the issue in the trial court.

Cross-appeal

U.S. Commercial cross-appeals from the court's denial of its motion for attorney fees. The relevant fee provision, found in the PPM, states, "If either party commences litigation for the judicial interpretation, enforcement, termination, cancellation, or rescission hereof, or for damages (including liquidated damages) for the breach hereof against the other party, then, in addition to any or all other relief awarded in such litigation, the substantially prevailing party therein shall be entitled to a judgment against the other for an amount equal to reasonable attorneys' fees and other costs incurred." The court denied the motion on two grounds. First, it concluded the fee provision did not cover the present lawsuit. Second, it concluded U.S. Commercial was not a party to the fee provision. We review the court's ruling on the applicability of the fee provision de novo. (*Hemphill v. Wright Family, LLC* (2015) 234 Cal.App.4th 911, 914.) We conclude the court correctly determined the fee provision does not cover the present lawsuit.

U.S. Commercial contends that we must liberally construe the fee provision in favor of a fee award, and that, so construed, the provision covers this lawsuit. What U.S. Commercial fails to do, however, is parse the language of the fee provision and identify any part of the fee provision that covers the present lawsuit. Our own review of the provision leads us to conclude there is only one possible phrase in the fee provision that even theoretically could cover the present lawsuit, and that is "litigation for the judicial interpretation . . . hereof." But this was a negligence lawsuit. It was not a declaratory relief lawsuit. And even if the PPM would ultimately feature prominently in plaintiffs' theory that U.S. Commercial gave inadequate disclosures, it was still not litigation commenced "for the judicial interpretation" of any given provision. So far as we are aware, the parties never had a dispute about the interpretation of the PPM. Its adequacy, yes. But not its interpretation. U.S. Commercial concludes its argument with a statement that, in our view, highlights the narrowness of the fee provision here: "As such, this action arises from and pertains to the PPM . . . ." We agree. There is just one problem: the fee provision does not cover any lawsuit *arising from or pertaining to* the PPM. If it did, we would have a very different case. But the actual language is much narrower, and it does not cover this lawsuit. Accordingly, the court did not err.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs incurred on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.